

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LARRY ALLEN SMITH**

Claimant

VS.

## VALLEY PRO SOURCE

Respondent

AND

**CRUM & FORSTER INSURANCE COMPANY**

Insurance Carrier

Docket No. 199,793

## ORDER

Respondent appealed from an Award entered by Special Administrative Law Judge Michael T. Harris on May 24, 1996. The Appeals Board heard oral argument November 7, 1996.

## APPEARANCES

Claimant appeared by his attorney, Dennis Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher McCurdy of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

**ISSUES**

The Special Administrative Law Judge awarded benefits based upon a 60 percent work disability. Respondent raises the following issues on appeal:

- (1) Did claimant meet with personal injury by accident arising out of and in the course of his employment?
- (2) What is the nature and extent of claimant's disability?
- (3) Is respondent liable for payment of unpaid medical expenses relating to treatment for reflex sympathetic dystrophy?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, and after considering the arguments of the parties, the Appeals Board finds and concludes as follows:

- (1) Claimant has met his burden of proving by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment. Claimant has also met his burden of proving that those injuries include bilateral carpal tunnel syndrome and reflex sympathetic dystrophy.

Claimant was injured on December 10, 1993, when he slipped and fell while pushing a two-wheeler filled with 300 to 400 pounds of frozen food. Claimant injured his upper extremities bilaterally. Although respondent seeks to draw certain negative inferences from the similarity between the current injury and a previous injury claimant suffered, respondent provides no evidence which directly contradicts claimant's version of this accident. The Appeals Board finds the accident occurred as claimant described.

Respondent disputes claimant's assertion that he suffered bilateral carpal tunnel syndrome and reflex sympathetic dystrophy as a result of his accident. The authorized treating physician, Dr. Bradley W. Storm, diagnosed bilateral carpal tunnel syndrome and performed surgery for that condition. Dr. Storm testified that, in his opinion, the bilateral carpal tunnel preexisted but was aggravated by the fall when claimant landed on his wrists and hands. Dr. Storm's testimony on the issue is essentially uncontradicted in the record and the Appeals Board finds bilateral carpal tunnel syndrome was a compensable injury which arose out of and in the course of claimant's employment.

The record is less clear on the existence and cause of reflex sympathetic dystrophy. After his surgery, claimant continued to have problems and went, on his own, to Dr. Charles E. Vilmer. Dr. Vilmer diagnosed recurrence of carpal tunnel syndrome but referred claimant to Dr. Revis C. Lewis for further evaluation. Dr. Lewis diagnosed reflex sympathetic dystrophy. This diagnosis was confirmed by Dr. Williams who performed a sympathectomy to relieve claimant's symptoms. Dr. Vilmer agreed with the diagnosis by Drs. Lewis and Williams and testified that, in his opinion, claimant's reflex sympathetic dystrophy was caused by his fall at work. Although Dr. Storm testified that he found no evidence of reflex sympathetic dystrophy, he does not affirmatively rule it out. The Appeals Board finds that the evidence establishes more probably than not claimant did suffer from reflex sympathetic dystrophy which was caused by his fall at work. The condition, therefore, arose out of and in the course of his employment and is a compensable injury.

(2) The Appeals Board finds that claimant sustained an 81 percent work disability.

The Appeals Board first finds that claimant's injury has rendered him unable to return to his previous employment and finds that he did not engage, post-injury, in any employment for a wage equal to 90 percent or more of his pre-injury wage.

Work disability is defined in K.S.A. 44-510e, as amended, as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The record contains no indication that claimant was offered employment for a wage of 90 percent or more of his pre-injury wage and no other evidence tending to support application of principle's stated in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board, therefore, concludes that the wage prong should be 100 percent.

The respondent argues that the evidence fails to meet claimant's burden of establishing the task loss factor. Specifically, respondent argues that the record contains no opinion of a physician stating the percentage of task loss. The record, in fact, contains the opinions of two vocational experts, Mr. Michael Dreiling and Mr. Daniel Fischer, which apply medical restrictions to claimant's 15-year task history. Mr. Dreiling concludes claimant has a 63 percent loss and Mr. Fisher concludes claimant has a 58 percent task loss. The Appeals Board agrees that neither of these opinions is competent to establish the task loss factor. The statute requires that the task loss be based upon the opinion of a physician.

On the other hand, the Appeals Board agrees with claimant's contention that the opinions of Dr. Vilmer adequately establish the task loss. Dr. Vilmer testified that claimant's injuries would prevent him from driving a truck, loading or unloading a truck, loading or unloading construction material, putting up sheetrock, painting, and operating power equipment. This opinion would eliminate five of the eight tasks listed by Mr. Dreiling in claimant's 15-year work history. The Appeals Board does not consider it necessary that the physician do the math and state the percentage. The physician must, however, apply his or her work restrictions to the list of tasks. Dr. Vilmer's opinions preclude claimant from performing tasks 2, 3, 5, 7, and 8 of the tasks list prepared by Mr. Dreiling. Dr. Vilmer expresses no opinions on tasks 1, 4, and 6 and the Appeals Board, therefore, finds claimant has failed to meet his burden to establish that claimant could not perform those tasks.

As previously indicated, respondent presented the testimony of Mr. Fischer indicating there was a 58 percent task loss. The record contains no opinion of a physician confirming or affirming that opinion and the opinions of Dr. Vilmer do not correlate with the task list prepared by Mr. Fischer. Accordingly, the Appeals Board finds claimant has lost the ability to perform five of the eight tasks performed in his 15-year work history and has a 62.5 percent task loss component of the work disability test.

Averaging together the 100 percent wage loss and the 62.5 percent task loss, the Appeals Board concludes claimant has an 81 percent work disability. K.S.A. 44-510e(a), as amended.

(3) The Appeals Board concludes that the respondent should be required to pay for the medical expenses incurred for the diagnosis and treatment of claimant's reflex sympathetic dystrophy. K.S.A. 44-510(b) provides in pertinent part as follows:

"If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, the employer shall be liable for such expenses subject to the regulations adopted by the director."

The record, in this case, establishes that after Dr. Storm provided treatment, including surgery for carpal tunnel syndrome, respondent refused to provide further treatments but did so after Dr. Vilmer and Dr. Lewis had diagnosed the reflex sympathetic dystrophy and had requested authorization to provide further treatment. As above indicated, the Appeals Board has found that the reflex sympathetic dystrophy was caused by claimant's work-related injury. Respondent is, therefore, responsible for payment for the treatment of that injury.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated May 24, 1996, should be, and hereby is, modified:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Larry Allen Smith, and against the respondent, Valley Pro Source, and its insurance carrier, Crum & Forster Insurance Company, for an accidental injury which occurred December 10, 1993, and based upon an average weekly wage of \$710.05 for 47.43 weeks of temporary total disability compensation at the rate of \$313 per week or \$14,845.59, and 272.06 weeks at the rate of \$313 per week or \$85,154.41, for an 81% permanent partial disability making a total award of \$100,000.

As of November 29, 1996, there is due and owing claimant 47.43 weeks of temporary total disability compensation at the rate of \$313 per week in the sum of \$14,845.59, and 107.57 weeks of permanent partial disability compensation at the rate of \$313 per week in the sum of \$33,669.41 for a total due and owing of \$48,515.00, which is to be paid in one lump sum minus amounts previously paid. The balance of \$51,485.00 will be paid at \$313 per week for 164.49 weeks.

Claimant is further entitled to unauthorized medical up to the statutory maximum.

Future medical will be awarded upon proper application to and approval by the director.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Hostetler & Associates

Deposition of Revis C. Lewis, M.D.	\$289.55
Deposition of Michael J. Dreiling	\$174.05
Deposition of Charles E. Vilmer, M.D.	\$236.70
Deposition of Larry Allen Smith	\$ 67.40
Deposition of Daniel J. Fischer	\$163.30
Deposition of Bradley W. Storm	\$282.65
Deposition of Andrew I. Myers, M.D.	Unknown

Barber & Associates

Transcript of Regular Hearing	\$248.30
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Special Administrative Law Judge

Michael T. Harris	\$150.00
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**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS  
Christopher McCurdy, Wichita, KS  
Michael T. Harris, Special Administrative Law Judge  
Office of Administrative Law Judge, Wichita, KS  
Philip S. Harness, Director